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Teo Tiong Hoe @ Peter v Chiew Shir Ley

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HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24–135/7 OF 2013
CHEW SOO HO J
19 FEBRUARY 2014

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Companies and Corporations — Meetings — Calling of meetings — Extraordinary general meeting — Power of court to order meeting — Plaintiff and defendant sole shareholders in company — Defendant refusing to attend meetings — Whether deadlock situation arose — Whether application pursuant to s 150 of the Companies Act 1950 be granted — Whether plaintiff entitled to apply under s 150 — Whether court may make decisions on behalf of the board under s 150

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The plaintiff and the defendant were the only directors and shareholders of two companies known as Teo Development Sdn Bhd ('TDSB') and Billionfold Avenue Sdn Bhd ('BASB'). The plaintiff was the majority shareholder in the two companies. TDSB was engaged in several ongoing development projects. Payments were required to be paid to contractors, subcontractors and suppliers from time to time in those projects. The relationship between the plaintiff and defendant had broken down resulting in several suits being filed by the defendant, the defendant's mother in law and the defendant's husband against TDSB or BASB. The defendant had also instructed the subcontractors to stop work in the respective projects. The defendant was one of the two signatories of TDSB and BASB's bank accounts and all cheques had to be signed by the defendant or her husband. The plaintiff alleged that the defendant or her husband persistently refused to co-sign the cheques resulting in TDSB and BASB being unable to meet its financial obligations. The plaintiff had also been calling for board of directors meeting or members meeting or extra-extraordinary general meeting ('EGM') of the companies but the defendant had persistently refused to attend the meetings. Hence, the plaintiff prayed that pursuant to s 150 of the Companies Act 1965 ('s 150') the court order a meeting to be called. The defendant contended that s 150 only applied to EGMs and not to meetings of the board of directors.

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Held, allowing the plaintiff's claim with costs:

(1) The defendant had not been sincere or interested in attending any of the meetings called by the plaintiff through the company secretary whether they were meetings of the board of directors, members meeting or EGM. The meetings called for were not confined to board of directors meetings

only but involved members meeting or EGMs. Thus, the defendant's contention that s 150 did not apply, was untenable (see para 7).

(2) It was because of the bad relationship between both parties with the pending suits filed by defendant and/or others against the companies that it was more probable that the defendant had calculated to refuse or attempted to delay or frustrate any of the meetings called by any of the two companies or by the plaintiff. If the defendant was sincere and keen in the interests of the companies to attend to company's matters to be tabled in the meetings, there was no apparent reason for her not to attend or to give excuses to avoid those meetings (see para 9).

(3) The plaintiff and the defendant were the only directors and shareholders of the companies and the coram of two was as required by the article of association of the companies to convene or conduct a meeting of the companies. With this deadlock, s 150 was appropriate to be invoked to order a meeting so that the companies which were ongoing could continue with their operations (see para 11).

(4) Under s 150, if the application is made by any director or any member of the company, he or she needs to be one who would be entitled to vote at the meeting. The defendant was not the applicant under s 150 and therefore, her capacity to be able to exercise her right to vote in the meetings was non-issue (see para 12).

(5) On the EGM prayed for to consider and approve the appointment of an independent director, such an act was the business or matter for the companies to resolve or approve and it was not for the court to step in the shoes of the companies to decide for them unless it truly necessitates the intervention of the court. What is required of the court under s 150 as it stands is that the court may order a meeting to be called, held and convened; whatever to be tabled and considered in the meeting is for the meeting of the members to consider and resolve. The plaintiff had satisfied the requirements under s 150 (see para 13).

[Bahasa Malaysia summary

Plaintif dan defendan adalah satu-satunya pengarah dan pemegang saham kepada dua buah syarikat dikenali sebagai Teo Development Sdn Bhd ('TDSB') dan Billionfold Avenue Sdn Bhd ('BASB'). Plaintif adalah pemegang saham majoriti dalam kedua-dua syarikat itu. TDSB terikat dalam beberapa projek pembangunan yang sedang dijalankan. Pembayaran dikehendaki dibayar kepada kontraktor, subkontraktor dan pembekal-pembekal dari masa ke semasa bagi projek-projek itu. Hubungan antara plaintif dan defendan telah terputus mengakibarkan beberapa saman telah difailkan oleh defendan, ibu mertua defendan dan suami defendan terhadap TDSB atau BASB. Defendan juga telah mengarahkan subkontraktor untuk berhenti bekerja dalam projek-projek itu. Defendan adalah seorang daripada penandatangan untuk

akaun bank TDSB dan BASB dan kesemua cek perlu ditandatangani oleh defendan atau suaminya. Plaintif mendakwa bahawa defendan atau suaminya terus menerus enggan untuk secara bersama menandatangani cek-cek itu dan menyebabkan TDSB dan BASB gagal untuk memenuhi obligasi kewangannya. Plaintif juga telah memanggil untuk mesyuarat lembaga pengarah atau mesyuarat ahli atau mesyuarat agung luar biasa ('EGM') bagi syarikat-syarikat itu tetapi defendan terus enggan untuk menghadiri mesyuarat. Oleh itu, plaintif memohon bahawa menurut s 150 Akta Syarikat 1965 (s 150) agar mahkamah memerintahkan suatu mesyuarat diadakan. Defendan menghujahkan bahawa s150 hanya terpakai kepada EGM dan bukan mesyuarat lembaga pengarah.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan tidak ikhlas atau berminat untuk menghadiri apa-apa mesyuarat yang dipanggil oleh plaintif melalui setiausaha syarikat sama ada mereka adalah mesyuarat lembaga pengarah, mesyuarat ahli atau EGM. Mesyuarat yang dipanggil tidak terbatas kepada lembaga pengarah sahaja tetapi melibatkan mesyuarat ahli atau EGM. Oleh itu, hujahan defendan bahawa s 150 tidak terpakai, adalah tidak dapat dipertahankan (lihat perenggan 7).

(2) Disebabkan hubungan yang tidak baik antara kedua-dua pihak dengan saman yang sedang belum selesai difailkan oleh defendan dan/atau lain-lain terhadap syarikat-syarikat yang ia adalah lebih berkemungkinan bahawa defendan telah mengira untuk enggan atau mencuba untuk melambatkan atau menggagalkan apa-apa mesyuarat yang dipanggil oleh kedua-dua syarikat atau oleh plaintif. Jika defendan ikhlas dan berminat dalam kepentingan syarikat-syarikat yang akan dibentangkan di dalam mesyuarat, tiada alasan yang jelas baginya untuk tidak menghadiri atau memberi alasan-alasan untuk mengelak daripada mesyuarat-mesyuarat itu (lihat perenggan 9).

(3) Plaintif dan defendan adalah satu-satunya pengarah dan pemegang saham syarikat dan dua kuorum seperti mana yang dikehendaki oleh artikel persatuan bagi syarikat-syarikat untuk mengadakan atau mengendalikan sesuatu mesyuarat syarikat. Dengan kebuntuan ini, s 150 adalah sesuai untuk digunakan untuk memerintahkan mesyuarat supaya syarikat-syarikat yang sedang berjalan dapat meneruskan operasi mereka (lihat perenggan 11).

(4) Di bawah s 150, jika permohonan dibuat oleh mana-mana pengarah atau mana-mana ahli kepada syarikat, dia hendaklah menjadi seorang yang berhak untuk mengundi dalam mesyuarat. Defendan bukanlah pemohon di bawah s 150 dan oleh itu, kapasitinya untuk boleh melaksanakan haknya untuk mengundi di dalam mesyuarat bukanlah satu isu (lihat perenggan 12).

(5) Bagi EGM memohon untuk mempertimbangkan dan meluluskan pelantikan seorang pengarah bebas, tindakan sedemikian adalah perniagaan atau perkara bagi syarikat-syarikat untuk menyelesaikan atau meluluskan dan ia bukan untuk mahkamah untuk mengambil alih kuasa daripada syarikat-syarikat untuk membuat keputusan untuk mereka melainkan jika ia benar-benar memerlukan campur tangan mahkamah. Apa yang diperlukan mahkamah di bawah s 150 adalah bahawa mahkamah boleh memerintahkan supaya suatu mesyuarat dipanggil, diadakan dan bersidang; apa sahaja yang akan dibentangkan dan dipertimbangkan dalam mesyuarat itu adalah bagi mesyuarat ahli untuk menimbang dan menyelesaikan. Plaintif telah memenuhi syarat-syarat di bawah s 150 (lihat perenggan 13).]

Notes

For cases on calling of meetings, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 520–526.

Cases referred to

Foo Tong Eng v Po Gun Suan [1982] 1 MLJ 337 (refd)
In re El Sombrero Ltd [1958] 1 Ch 900, Ch D (refd)
Leong Ah Hong v Hup Seng Co Ltd [1963] MLJ 164 (refd)
Low Son Siang @ Loo Soon Siong v Lee Kim Yong [1998] MLJU 467; [1999] 1 CLJ 529, HC (refd)
Opera Photographic Ltd, Re [1989] BCLC 763, Ch D (refd)
Phuar Kong Seng v Lim Hua [2005] 2 MLJ 338; [2004] 8 CLJ 478, HC (refd)
South British Insurance Co Ltd, Re [1980] 1 BCR (NZ) 286 (refd)
Tay Say Geok & Anor v Tay Ek Seng Co Sdn Bhd [1974] 2 MLJ 70, FC (refd)

Legislation referred to

Companies Act 1965 s 150

Chau Shin Yee (Sugumar & Co) for the plaintiff.
Alvin Leong (Shelley Yap) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] The plaintiff's claim vide this application, encl 2 is to seek an order of court for the following:

(a) an extraordinary general meeting of Teo Development Sdn Bhd (Company No 725157-A) and Billionfold Avenue Sdn Bhd (Company No 898936-A) be called, held and conducted on such dates and in such manner as this honourable court thinks fit to consider and approve, inter

alia, that Yap Chi Keong (NRIC No 521204–10–6047) be appointed as an independent director of Teo Development Sdn Bhd (Company No 725157-A) and Billionfold Avenue Sdn Bhd (Company No 898936-A);

(b) in the event that there is insufficient quorum at the extraordinary general meeting of Teo Development Sdn Bhd (Company No 725157-A) and Billionfold Avenue Sdn Bhd (Company No 898936-A) called, held and conducted pursuant to the order of this honourable court herein one member present in person at the extraordinary general meeting shall be deemed to constitute a valid extraordinary general meeting of Teo Development Sdn Bhd (Company No 725157-A) and Billionfold Avenue Sdn Bhd (Company No 898936-A);

(c) any one or more resolutions passed by one member present in person at the extraordinary general meeting called, held and conducted pursuant to the order of this honourable court herein shall be lawful and valid and binding on Teo Development Sdn Bhd (Company No 725157-A) and Billionfold Avenue Sdn Bhd (Company No 898936-A); and

(d) costs.

[2] This application is made pursuant to s 150 of the Companies Act 1965.

[3] The plaintiff and the defendant are the only directors and shareholders of the two companies known as Teo Development Sdn Bhd (Company No 725157-A) ('TDSB') and Billionfold Avenue Sdn Bhd (Company No 898936-A) ('BASB'). The plaintiff is the majority shareholder in the shareholding of the two respective companies.

[4] TCSB is engaged in several development projects such as commercial shoplots project, residential and industrial projects, inter alia, which are ongoing while BASB is undertaking Lok Kawi Commercial Shoplots Project which is also ongoing and all of them are yet to be completed. Parties do not dispute that for all the aforesaid projects undertaken by both companies, payments are required to be paid to contractors, subcontractors and suppliers from time to time. Both companies are also required to make payments to the banks for the banking and hire purchase facilities granted.

[5] From the facts and evidence, the plaintiff asserted that the relationship between the plaintiff and the defendant have broken down resulting in several suits being filed in the High Court and sessions court by the defendant, the defendant's mother in law and the defendant's husband against TDSB or BASB and also the instructions from the defendant to the subcontractors to stop work at the respective projects of the said companies. The defendant had also unilaterally instructed the financial controller of both companies pertaining to the cheques signed by the defendant for staff salaries and hire purchase facilities

repayments. The plaintiff averred that the defendant is one of the two signatories of TDSB and BASB's bank accounts and all cheques for payment to contractors, subcontractors, supplier, salaries, outgoings and repayments to financial institutions have to be signed by the defendant or her husband. However, the plaintiff alleged that the defendant or her husband have persistently refused or failed to co-sign the cheques resulting in TDSB and BASB being unable to meet its financial obligations. In addition, the plaintiff had been calling for board of directors meeting or members meeting or extra-extraordinary general meeting of the companies but the defendant, it was alleged, had persistently refused and/or failed to attend and/or attempted to frustrate and/or delay the meetings of the TDSB. The plaintiff contended that pursuant to s 150 of the Companies Act 1965, the court may order a meeting to be called, held or conducted as the court thinks fit or expedient including a direction that one member present in person or by proxy shall be deemed to constitute a meeting, inter alia, citing in support *Leong Ah Hong v Hup Seng Co Ltd* [1963] MLJ 164; *In re El Sombrero Ltd* [1958] 1 Ch 900; *Re Opera Photographic Ltd* [1989] BCLC 763, *Re South British Insurance Co Ltd* [1980] 1 BCR (NZ) 286 as cited in *Corporate Powers Controls, Remedies and Decision-making* pp 501–502; *Phuar Kong Seng v Lim Hua* [2005] 2 MLJ 338; [2004] 8 CLJ 478; *Foo Tong Eng v Po Gun Suan* [1982] 1 MLJ 337, inter alia.

[6] The defendant contended, inter alia, that s 150 of the Companies Act 1965 only applies to meetings of the company ie extraordinary general meeting ('EGM') but not applicable to meetings of the board of directors citing *Tay Say Geok & Anor v Tay Ek Seng Co Sdn Bhd* [1974] 2 MLJ 70 and that the onus is on the plaintiff to show that it was impracticable to call for a meeting of the company in any manner whatsoever: *Low Son Siang @ Loo Soon Siong v Lee Kim Yong* [1998] MLJU 467; [1999] 1 CLJ 529. The defendant endorsed there are difficulties but denies indirectly the relationships between both parties have broken down irretrievably but the difficulties between them have rendered it impractical to call, hold or conduct meetings. It was contended that the defendant was not attempting to exercise any kind of veto right when she failed to attend those meetings.

FINDINGS OF COURT

[7] From the facts and evidence in this case and of the plaintiff's submission on the circumstances as listed in paras 47a–h and j–n, I am inclined on a balance of probabilities to hold the view that the defendant had not been sincere or interested in attending any of the meetings called by the plaintiff through the company secretary whether they were meetings of the board of directors, members meeting and/or EGM. I do not find the meetings called for were confined to board of directors meetings only but involved members meeting and/or EGMs. Thus the defendant's contention that s 150 of the

Companies Act 1965 does not apply or it is premature, in the circumstances of the instant case and on the facts of the case is untenable.

[8] From the suits filed against TDSB or BASB by the defendant and/or the parties closely related to her and the fact that the directors and shareholders of TDSB and BASB are the plaintiff and the defendant only and none others, it can be perceived that the defendant's relationship with the plaintiff in respect of these two companies is undoubtedly not good so much so that the defendant and/or the parties closely related to her had to resort to legal suits against the companies which is virtually and factually against the plaintiff who is the other only shareholder besides the defendant.

[9] On the totality of evidence, I am more inclined to find that it is because of the bad relationship between both parties herein with the pending suits filed by the defendant and/or others against the two companies that it is more probable that the defendant had calculated to refuse and/or attempted to delay and/or frustrate any of the meetings called by any of the two companies or by the plaintiff indirectly. If the defendant is sincere and keen in the interests of the companies to attend to company's matters to be tabled, deliberated and decided in the meetings, there is no apparent reason for her not to attend or to give excuses to avoid those meetings.

[10] Section 150 of the Companies Act 1965 provides:

> If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to veto at the meeting or of the personal representative of any such member, order a meeting to be called, held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

[11] In my judgment, I find the circumstance of this case is eminent that it is impracticable to call for a meeting by the said company or companies if the meeting or meetings could only be conducted or convened if the defendant or her proxy had attended. This is particularly so when the plaintiff and the defendant are the only directors and shareholders of the said two companies and the coram of two is as required by the article of association of the companies to convene or conduct a meeting of the companies. With the deadlock in the instant case between the plaintiff and the defendant, I am of the view that s 150 of the Companies Act 1965 is appropriate to be invoked to

order a meeting so that the companies which are ongoing can continue with their operations; otherwise, disparaging damages may occasion to the companies when payments to contractors, subcontractors, suppliers and repayments to the banks would not be made when companies cheques which require two signatories were not signed by one of the two requisite signatories as the said signatory ie the defendant or her husband has allegedly refused to so sign them. In the cited case of *Phuar Kong Seng v Lim Hua*, the conduct of the defendant in declining to sign cheques was held to be a significant factor to be taken into consideration in exercising the court's discretion in an application under s 150 of the Companies Act 1965 which I find in the circumstances of this case where there are only two shareholders cum directors who are also the only two signatories besides the defendant's husband to company cheques and when one of them refuses to sign the cheques, this would definitely maim the operation of the companies involved in development and/or construction business where payment is fundamental and inevitable.

[12] On the interpretation of s 150 of the Companies Act 1965 where the defendant contended that she would not exercise any of her veto right when she had not attended the meetings, this contention apparently does not appear to be a requirement under s 150. What is required is that if the application is made by any director or any member of the company, he or she needs to be one who would be entitled to vote at the meeting. The defendant is not the applicant under s 150 of the Companies Act 1965 and therefore, her capacity to be able to exercise her right to vote in the meetings is non-issue.

[13] On the EGM prayed for to consider and approve the appointment of an independent director, I find such an act to be the business or matter for the companies to resolve or approve and it is not for the court to step in the shoes of the companies to decide for them unless it truly necessitates the intervention of the court. What is required of the court under s 150 of the Companies Act 1965 as it stands is that the court may order a meeting to be called, held and convened; whatever to be tabled and considered in the meeting is for the meeting of the members to consider and resolve. On the totality of the evidence, I find that the plaintiff has satisfied the requirements under s 150 of the Companies Act 1965.

[14] For the foregoing reasons, I allow the plaintiff's claim as prayed in prayers (a)–(c) and order an EGM of the two aforesaid companies to be called, held and conducted within 30 days from the date hereunder on a date to be determined by the company secretary with notice of such meeting to be notified to both the plaintiff and the defendant by ordinary post five days before the said meeting is scheduled to be convened to their respective addresses as appeared in the companies registers. Costs of RM5,000 is awarded to the plaintiff.

Plaintiff's claim allowed with costs of RM5,000.

Reported by Kanesh Sundrum